

William Co.
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ADDRESS

DELIVERED TO THE

Grand Jury of Washington County, Pa.

**AT THE JANUARY TERM OF THE COURT,
1835,**

BY THE HON. THOMAS H. BAIRD,
PRESIDENT JUDGE OF THE 14th JUDICIAL DISTRICT.

PUBLISHED AGREEABLY TO A RESOLUTION OF THE JURY.

WILLIAMSPORT, Wash. Co. Pa:

PRINTED BY BAILEY & HAMMOND.

Grand Jury Room, }
Washington, Jan. 29th 1835. }

Hon. THOS. H. BAIRD,

DEAR SIR:—The Grand Inquest &c. setting for the body of the County of Washington, respectfully request that you will furnish for publication, your excellent address delivered to them at the present term of the court.

Respectfully

your obt. servants,

Signed in behalf of the Jury—

SHESH. BENTLEY, Jr.

Foreman.

———— { * } ————

WASHINGTON, Jan. 30th 1835.

GENTLEMEN—Agreeably to your request, I will with pleasure, furnish you with a copy of my address, for your disposal, as soon as I shall have time to transcribe it.

I am gentlemen, with respect
and esteem, your friend
and fellow citizen.

THOS. H. BAIRD.

To SHESH. BENTLEY, Jr. *Foreman*,
and the other gentlemen of
the Grand Jury.

ADDRESS.

GENTLEMEN OF THE GRAND JURY:

The study of Jurisprudence, or "the science of what is just, and unjust, or the laws, rights and customs necessary for the doing of Justice," is the most interesting pursuit to moral and social man. The investigations of the Philosopher, the researches of the Antiquarian, and the disquisitions of the Metaphysical enquirer, all tend to stimulate the human intellect, to elevate the mind, and to improve the heart; the advancement of the arts also, softens and embellishes life, by opening to the enjoyment of taste new exhibitions of beauty, order and utility; and affords us a constantly increasing source of physical felicity, from the various combinations of the powers and productions of nature, employed for our ease and comfort. But a knowledge of those principles that regulate our "civil conduct" is still more important. To man, conscious of *rights* and sensible of *weakness*, the coercive rules of society that protect him from the violence of aggression, are absolutely necessary. Without them our dearest privileges would exist only in the fancy of the theorist.

Law is the adaptation of the principles of justice to the intercourse of men; it comes home, therefore, to their business and their bosoms, and it is indispensably requisite that every individual should be apprised of its commands. It would be absurd as well as unjust to require obedience without prescribing a precept. Legal duties and prohibitions are always, therefore, supposed to be sufficiently promulgated, and it is expected that every citizen is well acquainted with them. The Roman code declared that "*leges sacratissimæ quæ constringunt hominum vitas intelligi ab omnibus debent*"—the most sacred laws which constrain the lives of men ought to be understood by all. We also hold it as a maxim, that "*ignorance excuses no one.*" This presumption might have been reasonable in the first ages of society, when the transactions of men and the municipal regulations to controul them were few. But as knowledge, trade, and wealth advanced with civilization, the relations of the different members of every community became more complicated, and the laws more numerous. In most nations that have arrived at any degree of refinement, to understand the whole or even a part of the Judicial system, is the business of a most laborious life, and is scarcely attainable by industry aided by education and studious habits. This is the situation of legal science in this country, where above all others a general knowledge of the existing laws is essential not only to determine our conduct, but to aid in legislation

which belongs to the people at large. Instead of a condensation of elementary principles reduced to order and analysis, adapted to the comprehension of every one, we have precedent added to precedent, like Ossa upon Pelion, until at length our Jurisprudence resembles an inverted pyramid. To adopt a maxim, therefore, to preclude the idea of ignorance, is not only absurd and deceptive, but dangerous; it makes us close our eyes to an evil already too great, and every day increasing with accumulating volumes. We are sure that even Judges, whose duty it is to declare and expound the law, frequently differ as to its provisions: We are aware that our Legislators cannot be acquainted with the whole system.—How then can we expect citizens, who have other pursuits, to know accurately the rule of their obedience? In fact they do not: “the lucubrations of twenty years” cannot fully develope the arcana of legal science to the most indefatigable student; and if it were even possible, by assiduity and labour, to read all that has already been written on the subject, the work would not be finished, for new matter is continually adding to the heap. This thing must arrive at a point beyond which it cannot go. The fabric will fall from its own weight and we must return to first principles and build anew. In doing so, we may, to be sure, substitute the *Arch* and the *Column* for the wooden lintel and posts of the rude ages, but the foundation of the structure must be the same.

To prepare for this immense Legislative work, it is important to review the history of Jurisprudence, trace the origin of laws and the changes of municipal regulations with the fluctuations of national prosperity and policy:—to investigate the necessary relations between Judicial science and the physical, commercial, and agricultural circumstances of a country, and to deduce from the pure fountain of unalterable rectitude such rules as are best adapted to promote individual and social happiness. The grand source from which all laws emanate, is JUSTICE; which exists in the essence of DEITY, and is imperfectly stamped upon the conscience. This virtue, in its most extended signification, comprehends the whole duty of man to GOD, to his *neighbor* and *himself*. In this enlarged sense it is used by Cicero, when he says, “*Est enim pietas iustitia adversum deos*”—Piety is justice towards the gods. Considered, however, as a *social* principle, it indicates an *habitual disposition* or inclination of the mind, to *render to every one that which belongs to him*. Viewed in this light, it has a necessary reference to the *rights* of others; and as these are *perfect* or *imperfect* there is a correspondent distinction of Justice. A *perfect right* to any thing may be said to exist wherever *divine* and *human* laws allow a person to claim and assist him to recover. A man has only an *imperfect right* to the offices of charity, gratitude, civility, &c., which, though really due, he cannot coerce. It necessarily follows from this division, that *injustice* is also of two kinds: the one where

an injury is inflicted by an act of aggression; another, which *they* are chargeable with who neglect to defend the wronged when it is in their power. The first can be the subject of Judicial notice, because it is susceptible of proof; the latter, perhaps, cannot, as the criminal disposition is not publicly exhibited.

Mr. Hobbes supposes that Justice is derived from the principle of *fear*; and that men are only induced to respect the rights of others from an apprehension that their own should be invaded. They yield, therefore, the uncircumscribed license of their natural state for a limited right in society: thus submitting to a lesser evil to avoid a greater. This hypothesis is unquestionably incorrect, as a slight reflection will abundantly show. The true foundation of Ethics is the will of God, who is the common father of all mankind. It cannot be pleasing to him that one man should, by violence or fraud, usurp controul over another, or disturb him in his rational enjoyments. In all the works of Deity we find *order* and *harmony*; every part of the vast structure of the universe fills its place and performs its operations without confusion or derangement; the immense orbs, that roll in boundless space, pursue their prescribed courses without contact or collision. Can we, then, believe that rational man alone of all the works of infinite wisdom, should be formed with dispositions to irregularity? The inward monitor, *conscience*, repels such a suggestion, and declares to us that the Benevolent Author of our being desires our happiness, and has, therefore, given us a regard for the rules of Justice, as necessary to secure it. *Reason*, as well as *Revelation*, tells us that *we should not do to another what we would not that he should do to us*. We do not hesitate to pronounce the man *unjust*, who would deprive us of a good which we lawfully enjoy.—“All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring and possessing property and reputation, and of pursuing their own happiness.” These are the great principles of liberty and of Justice, derived from the Author of every good. They declare an *equality of right* which subsists in all the essentials of being and enjoyment, under all the changes of adventitious circumstances to which humanity is subject. It matters not what a man’s condition in life may be, whether high or low, rich or poor, a prince or peasant, he has an *equal right* to what lawfully belongs to him, with that which any other can have. In all that respects *life, limb, character* and lawful *acquisitions*, the meanest person, if innocent, is equal to the greatest of men. These truths we would recognise and acknowledge from a moral sense, if no society existed: they must have been, therefore, antecedent to civil government. Justice, however, is necessary to the prosperity of the social state; and in proportion as its principles are observed and inferred, will be the physical, as well as moral welfare of the community.

In reference to Judicial concerns, *Justice* respects the *rights* of men, and consists in only claiming our own, and in giving to others what belongs to them. In this sense it is either *distributive* or *commutative*. The first is *remuneratory* or *punitive*; dealing out rewards and punishments as the actions of men are good or evil. The second regards *contracts* or *agreements*, and regulates the commutation of things, according to equality, without regard to persons or circumstances. The civil law declares the precepts of Justice to be "*honeste vivere, alterum non lædere, suum cuique tribuere*;" that is, to live honestly, to injure none, and to render to every man his own. This definition contains the same assertion of rights and of duties, expressed, perhaps, with more conciseness and perspicuity.

These few simple, but unalterable principles, form the basis of Jurisprudence in every nation and age of the world. In the diffusion and application of them to the transactions of life, great diversity has prevailed. It is evident that, in the social state, the precepts of Justice must be amplified by positive law. We all admit that *we ought not to injure any one*, and that *we should render to every man his own*, but we may disagree as to what will amount to the prohibited *wrong*, and what will constitute the legitimate *right*. It is necessary, therefore, that the superstructure of Jurisprudence should be erected. In the first ages, it is probable that the only laws, were the *commands* of the rulers, directed to the particular circumstances of every case as it presented itself. Neither Orpheus, Homer, nor Musæus, the most ancient Grecian writers, say any thing of an existing municipal system; nor have we any mention of public legislation before that of God himself, through Moses at Mount Sinai. Livy, who wrote after the Roman code was formed, says—"Barbaris, pro legibus, semper dominorum imperia fuerunt:"—the *commands* of their lords were always *laws to the barbarians*; by which epithet all other nations were then designated. Justin also declares that in the origin, civil government was regal or patriarchal, and that the people were held by no laws but the arbitrament of their princes: and Cicero alleges that kings were first elected to *distribute* Justice, because there were no *written rules* or fixed standard of rights. Lycurgus, the Legislator of Sparta, in his Rhetra, forbade his laws to be wrote, because "he was persuaded they would be more durable and lasting if writ in the hearts and minds of men than in tables and books." No doubt, at a very early period, the decrees of despotic monarchs were communicated by means of letters or hieroglyphics. We learn that Ahasuerus *wrote* to the provinces, in the case of the Jews, and it was a *commandment* to the people. We read, also, of the laws of Solon, of Draco, &c. which were, no doubt, reduced to writing, but we have only very imperfect historical evidence respecting them.

The first diffusive, human positive code, adapted to the exigencies of social connection, of which we have knowledge, was that of the Romans. In the commencement of their government all things were controulled by the authority of the King, without any other standard of equity and justice than *his will*. But when the city became populous, it was divided by Romulus into thirty curiæ or tribes, by whom his laws were confirmed. The same practice continued under several monarchs, until at length the whole of their constitutions were collected and embodied by Sextus Papirius, in the time of Tarquin the proud. These were all, however, soon after abrogated, upon the expulsion of the royal family, and Judicial proceedings were regulated for many years by *custom* and the *judgments of the Courts*, or a kind of common law. To remedy this evil, intelligent persons were sent to the twelve principal cities of Greece to collect their best laws, and upon their return, the Decemviri, compiled the *twelve tables*. The excellence of this institution was so great, that Cicero declared it to be "*preferable to whole libraries of the philosophers*." This valuable compend did not long satisfy the legislating propensity of the Romans.—New laws were daily added by the different authorities. The assemblies of the people made what were called "*Plebiscita*:" The Senate enacted their "*Consulta*:" The Consuls, the Prætors, and the Tribunes all were legislators. From these sources arose a constant accumulation of legal provisions, which at length became so great, that in the time of Julius Cæsar, a digest was commenced. This was not completed until the reign of Adrian, when the twelve tables were supplied by the "*perpetual edict*," which was declared to be the standard of civil Jurisprudence.

The making of laws, however, still continued to progress and the lawyers occupied themselves in compiling "*reports*" with wonderful assiduity and labour. Antistius Labeo, an eminent sage of the profession, found time from his business to write 400 books on the subject: the 259th book of his cotemporary, Ateius Capito is quoted; and few teachers could comprise their opinions in less than 100 volumes. Three private lawyers, Gregorius, Thermogenes and Papirius, first attempted to arrange this chaos, by making selections; and afterwards the Emperor Theodosius (A. D. 438) ordered a code to be compiled, which was called by his name, and was received as the only authentic book of civil law in the western part of Europe for many centuries after. In the Eastern empire when Justinian ascended the throne, (in 527) the reformation of the Roman Jurisprudence was obviously an arduous but indispensable work. The laws and legal opinions which had authority, were diffused through many thousand volumes which no fortune could procure or capacity digest. As the art of printing was not known, copies could not easily be obtained; consequently, the people were totally ignorant of the municipal regulations upon which

their lives and properties depended. Tribonian, a man eminently qualified, was charged with the important duty of reducing this unwieldy bulk to analysis and method. Having chosen competent associates, he commenced the laborious task and completed it with great celerity. The whole body of the civil law was condensed into four volumes called "The Code," "The Digest," "The Institutes," and "The Novels." This admirable system maintained its authority in the eastern empire, without any material innovation, for about 300 years; when it was supplanted by the "*Basilica*," composed by the Emperor Basil and Leo his son, which is still in force with the Turks. In the *west*, however, it was but little known after the irruption of the barbarous northern hordes had obliterated every other vestige of civilization and refinement. Some of its provisions were no doubt incorporated with the rude customs of the savage conquerors, but as a written code it was forgotten until a copy of Justinian's "digest" was discovered in 1130 at Amalfi in Italy. Several nations of the continent just then recovering from the convulsions that followed the overthrow of the Roman power, and settling into peace and tranquillity, were glad to adopt so perfect a system, as the basis of their civil constitution. It was, therefore, generally received, blended in a greater or lesser degree with the feudal usages and traditions that previously existed.

In England, however, from whence we derive our Jurisprudence, it was never recognised as the municipal law, although repeated attempts were made to introduce it. During the time that the Romans held Britain, it was no doubt in some degree observed, and many of its principles were perhaps embodied with the prevailing customs, but so changed, that the legal antiquarian cannot identify their origin. It is indeed contended by some, that the prominent features of our common law can be traced to the Romans.—And in support of this suggestion, it is observed that a considerable analogy exists between *our* organization of *Courts* and *Juries*, and *their* forms of administration. The parties were called "actor" and "reus"—the plaintiff and defendant. Their "*procuratores*" and "*advocati*," answer to our "*Counsellors and Attornies*." The "Prætor" was presiding *Judge*, and the "*arbitri*" and "*recuperatores*," seem to correspond with our *referees* at common law. They were chosen out of the "*Centum viri, litibus Judicandis*:" or *hundred men for deciding controversies*.

A private suit for the determination of a contested right was conducted in this manner: The injured person proceeded "*in jus reum vocari*,"—to summon his adversary into court. Upon his appearance the plaintiff *filed his declaration* which they called "*edere actionem*," and the defendant was required to give sureties for his future attendance, to abide the result. Upon the day appointed for the hearing, the Prætor called over the list of causes in their order. If any party failed to appear, he lost his suit and a judgment was given against

him, as it were, by *default*. If both were ready, the Prætor first bound them to perform the judgment whatever it might be, and then appointed an *arbitrer, recuperatores* or a *Jury* from the *Centum viri*, who were sworn to decide the case with impartiality.—In order to prevent the litigation from being improperly protracted, the number of witnesses were limited: the parties also took an oath, "*Juramentum calumniæ*,"—that they did not go to law with intent to vilify one another. After these preparatory measures, the "*disceptatio causæ*"—or *disputation* by the lawyers began, which was conducted on both sides with admirable ingenuity and eloquence. In forming the verdict, however, a material variation is to be observed between their mode and ours. Unanimity was not necessary; a majority was required to overthrow the defendant, but if they were equally divided he was cleared. If half awarded one sum and half another, the *least* only was recovered. This important difference (among others) proves that we must seek the origin of our institutions from another source: but the adoption of such a plan of trial, by so polite and polished a people, is a strong testimony in favour of that admirable system which has been the pride and boast of England, and which forms the best guaranty of private security in our own country.

Among the Romans, the proceedings in criminal causes were similar. The prosecutor delivered to the Prætor the name of the offender, with the crime which he alleged against him. A person was appointed called "*Judex questionis*"—to superintend the trial. Upon the day fixed a *Jury* was called and sworn, each party having the right to *challenge*. The cause then went on, and after the lawyers had closed their pleadings, the Jury retired to consult, having each three tablets covered with wax; on one of which was the letter A. for "*absolvo*,"—I acquit; on another C. "*condemno*"—I condemn, and on the third N. L.—"*non liquet*"—it does not appear. When they returned, the verdict was ascertained by the majority of tickets which they gave in. One remarkable defect in this organization, which strikes us at once, is the want of a *grand jury*, to examine the grounds of accusation, and detect mal-evidence or falsehood.

It is perhaps one of the happiest features in our administration of criminal justice, that no citizen can be put upon his defence, until *at least twelve* of his intelligent and respectable neighbours have said that there is proper foundation for the charge.—Another difference which exhibits the humanity of our laws, is, that the juries are instructed, in every case of doubt, to *acquit*. They cannot say that it "*does not appear*;" for unless they can plainly find the accused person *guilty*, his innocence must be presumed. In giving this preference to our own institutions it would be unfair to detract from the excellence of the Roman Jurisprudence. It was their civil polity, as well as their arms, that extended their

dominion almost over the world. Their military power subdued a *reluctant homage*, but their *laws* tempered the ferocious justice of the uncultivated nations and softened it to amenity and calm discrimination. Wherever their empire was established, their Judicial system had more or less influence, and their arts, and their manners communicated comfort and civilization. The Roman government, however, at length became too unweildly and too corrupt to subsist. The enervated despotism of the Emperors was illy calculated to manage its concerns with energy or wisdom.—The distant provinces were plundered by rapacious governors, or drained of their wealth by exorbitant taxes, to pamper the sensualities of a luxurious and depraved Court. The laws were no longer administered with regularity or equity, and the excellence of the system only rendered the administration more intolerable. In such circumstances, vigour of mind and independence of spirit could not long exist. Thus depressed, the empire seemed to invite the incursion of the brave, but barbarous hordes of the “Northern hive.” The Goths, the Vandals, the Huns, and innumerable other tribes, rushed from the vast country now occupied by the Danes, the Swedes, Poles, Russians, and Tartars, with resistless impetuosity, and buried Literature, Jurisprudence, and Arts, in one common ruin. Scarce a vestige of former things remained, and *new laws, new manners and new languages* were introduced.

The subversion of Roman power occasioned an entire revolution in the political state of Europe, and in the manners of the inhabitants. *Civil arrangements* gave place to *Military organization*, perfected by the feudal system. *Luxurious refinement* yielded to *ignorance, ferocity and rudeness*; and placid or stupid acquiescence to despotic authority, was stimulated to anarchical insubordination. Turbulence, oppression, and rapine prevailed; and the arts of elegance, civilization, and even comfort were obliterated. In the obscurity of this period, we must search for the principles of policy and Jurisprudence that now exist in most of the European nations. All the traces of written laws were lost, and traditional customs and maxims, perpetuated in the memory by short rhymes, constituted their Judicial system. In these usages, however, we find the origin of those institutions which, when polished and ameliorated by the wisdom and learning of succeeding generations, have proved peculiarly adapted to promote order and advance social happiness.

It is remarkable, that among all the barbarous nations that overrun the Roman empire, the most striking similarity existed in manners and political views. The Saxons occupied Britain;—the Franks, Gaul; the Goths, Spain; and the Lombards, Italy. Although forming unconnected societies, under different names and rulers, they established every where the same military organization in all its detail, and permitted their municipal concerns to be

regulated by the same simple rules. The streams of Jurisprudence, throughout Europe, have evidently proceeded from the same source. In most nations, the ancient feudal customs have since been blended with the civil law, which was recovered by the finding of Justinian's pandects at Amalfi, as already noticed; in England, however, from whence our common law is derived, the original features remain distinct, although embellished and improved.

It is useful as well as curious to look into the history of those principles that constitute with us the main rule of "civil conduct;" as far as imperfect records will assist. Lord Chief Justice Hale observes, that "*the origin of the common law is as undiscoverable as the head of the Nile.*" This may be true, as it respects the commencement of the customs that constitute it, but their introduction into our Jurisprudence we can certainly trace. It is doubtful whether any ancient usages of the aboriginal Britons are retained. They were conquered by the Romans, and the civil law perhaps was established. After the Romans withdrew, the Saxons, immediately from Germany, but originally of the great Teutonic family, invaded Britain and introduced their peculiar customs. As we are descended *naturally* and *politically* from this singular race, we cannot help feeling some interest in the history of the establishments they have transmitted to us. In the organization of their government, we find that the King was elected by the "*witena gemot*" or council of wise men, from whence the *Parliament* is derived. The society was divided into different classes, regulated by *birth*, *office* or *property*; a considerable portion of the population, however, were *slaves*. The administration of Justice was committed to the *nobles* of whom there were several grades. The supreme legal tribunal was the "*witena gemot*," already mentioned. There were, also, "*Shire gemots* and *Burgh gemots*," where every man was bound to attend if required. The laws had invariably a reference to the *rank* and *wealth* of the parties. *Pecuniary compensation* was always admitted for *personal injuries*, and criminal offences were punished in the same way. *Homicide* was considered both a *private* and *public* wrong:—consequently, money or "*were*" was awarded to the *family of the deceased*, and a *fine* was imposed on the murderer, called the "*wite*." The satisfaction to the community was paid to the Chief Magistrate, in whose jurisdiction the crime was committed, and varied according to the dignity of his person. The quality of the deceased and the circumstances of the offence, made a difference in the amount of the "*wite*." As civilization progressed, the value of human life was increased and the penalty for its deprivation enlarged; but still rank and property remained the barbarous and unjust criterion of estimation.

Theft or larceny, among the Anglo Saxons, was considered a most atrocious crime and was severely punished. In their earliest law it was declared to be a *felony*, or to incur a *forfeiture of*

goods. The penalties against this offence accumulated so unreasonably that, in the reign of Ethelstan, a provision was established (and which still subsists) that no one should lose his life for stealing less than *twelve pence*: To this they added a restriction, which we have abandoned—"unless he flies or defends himself."

The practice of giving *bail* to appear or answer an accusation, may be traced from the first period, very much as it is used at present. The trial by Jury, also, which forms the happiest characteristic of the common law, has descended to us from the earliest Saxon times. It can indeed be followed into Scythia, as one of the valuable privileges of the rude, but free inhabitants; and the institution of it is ascribed to "*Woden*" himself—their great legislator and chieftain. A similar mode of trial existed among the Romans, as already noticed, and Tacitus mentions, that in Germany the Lord of a territory had always 100 "*co-assessors*," chosen out of the "*Ingenui*" or *freemen*, when he sat in Judgment. It is said that the same number originally prevailed among the Saxons, but perhaps this is incorrect, as we find among the Visigoths, in Spain, descended from the same stock, that Juries of *twelve* men were employed, not only in determining rights, but in deciding upon the qualifications of men to high offices; and it is a fact that the *constable* in the "*court leet*" of an *English manor* is returned in the same way to this day. But at all events, we know that it existed in its present form as early as the time of Alfred, who hung Cadwine for sentencing a man to death without the verdict of *twelve Jurors*, upon whom he had put himself for trial. The same great monarch having united the *Heptarchy* and made himself master of the whole nation, collected the customs, which were then very numerous, into his "*Dome book*," designed for general use and denominated "*folk right*." These laws were observed for some time; but at length the Danes conquered a part of the kingdom and introduced their own usages, which were gradually incorporated with the rest. When Edward the Confessor came to the throne, he compiled a new system, which was thenceforth called the *Common Law*. Considerable interpolations were afterwards made by William, the Norman: and the feudal system of tenures by military service, which existed among the Saxons, was more perfectly established by him. Previous to his reign the jurisdiction, in questions of property and of crime, was territorial and independent. The great Lords, who held lands by charter, were invested with the power of judging their own tenants, in their own Courts, which were called Hallmotes.

There was yet no regularity of police, which could make the voice of the law heard and regarded by a fierce and unruly people. They only obeyed those who had power immediately to seize, and punish. The first Judges, therefore, were *Military Chieftains*, except on the allodial and the King's lands, where his

"reeve" or Sheriff, administered his authority. The Conqueror first established the "*Aula regis*," or great court in the *hall of his palace*, composed of his principal officers, over whom his personal representative the "chief Justiciary" presided. Suits were still prosecuted in the inferior courts, with the right of appeal to the "*aula regis*;" but Henry II. further reduced the influence of the territorial tribunals, by fixing six circuits and sending his own Judges throughout the kingdom. He also divided part of the business of the Justiciary's court between the *King's Bench* and the *Common Pleas*, which he erected; the one for *criminal* and the other for *civil matters*. Edward I. created the court of *Exchequer* and also invented a new Jurisdiction, in *Justices of the Peace*. The power of the court of Chancery was extended by Edward III. so as to apply *equity* to correct the *strictness of the law*, and to granting injunctions, and at length the duties of the "*aula regis*," being thus distributed, it was entirely dissolved. By this gradual process, the administration of the laws was taken from the great lords and committed to competent Judges, of suitable educations, elected for the purpose. The feudal jurisdictions became *weaker*, as the official jurisdictions gained *strength*; and at present, a landlord cannot hold a plea of debt amounting to more than forty shillings, to which sum only, the power of our Justices formerly extended. During this time also, the forms of judicial proceedings underwent a gradual but entire change. In the early part of the Saxon period, controversies were entirely decided by oaths, compurgators, and ordeal. This superstitious mode of trial was favoured by the clergy; but when the warlike Norman came to the throne, his followers introduced the custom of determining litigation by *battle*. After the government became more regular and settled, the uncertainty of such rules of Judgment was perceived. The *trial by oath* was generally disused, except in the wager of law. The *ordeal* was prohibited by Henry III. and though the *duel*, it appears from a late instance, was not entirely abolished, until 59th Geo. III. yet the defendant had leave either to *fight* or throw himself upon the *assizes, of twelve men*. Pruned of these absurdities the *Common Law* has been handed down to us as the standard of Justice, which, Lord Hale observes, "directs the course of descent of lands; the nature, extent and qualifications of estates; together with the manner and ceremonies of conveying them from one to another: the forms, solemnities and obligations of contracts; the rules and directions for the exposition of deeds and acts of parliament; the process proceedings, judgments, and executions, of our courts of Justice; also the limits and bounds of courts and Jurisdictions; the several kinds of temporal offences, and punishments, and their applications" &c.

The evidences of the legal customs that constitute it, are contained in the records of Judicial decisions, and books of reports, which

are abundantly voluminous. The most ancient work extant, on this subject, is that of Granvil, Chief Justice in the reign of Henry II. Britton, Bishop of Hereford, wrote a book of the common law; and Bracton, Lord Chief Justice in the reign of Henry III. composed a learned treatise which was held in great estimation. The commentary under the title "*Fleta*" was compiled in the reign of Edward III. about the year 1340, by an unknown author. It is supposed, however, that it was written by some lawyer, or lawyers, confined in Fleet prison; from whence the name of the work. From the time of Edward III. to Henry VII. four learned professors of the law were appointed to report the *Judgments and opinions* of the courts; and their periodical publications were called "year books." Plowden, Dyer and others succeeded,—and Lord Coke, who in his preface to his 4th reports, gives a catalogue of a lawyers library in his day; which consisted of not more than 20 volumes. From his time the number of reporters have been constantly increasing, and their works now must exceed 1000 volumes. It is in these monuments we are to look for those principles and maxims that constitute the "*Common Law*;" that happy system of forensic ethicks, which, descending from remote antiquity, and improved and refined by wise and good men in all ages, now well supplies the deficiencies of positive legislation in all the exigencies of social condition; and forms the best guaranty, which the citizen has, for the safeguard and defence, not only of his *goods, lands, and revenue*; but of his *wife and children, body, fame and even life*. In its precepts, rules, and forms of administration, it is the great basis of Jurisprudence in this state, and perhaps in all the states, except Louisiana, where something on the plan of the "*Code Napoleon*," has been adopted.

The wise and benevolent founder of Pennsylvania regarded it as the "*birth right*" of the first settlers; and the act of 1718 so declares. It was therefore introduced at the establishment of the provincial government, and continued in force until the Revolution; when it was expressly recognized in the first enactment now in the statute book of the "*Commonwealth*," and I believe the 2d law that was passed. In certain particulars, however, its features have at different times been altered or modified by better policy, and to suit the local circumstances of the country, or by express statutes. Thus, Wm. Penn, in his "*Charter of Privileges*," changed that severe rule of the common law, which deprived a criminal of the aid of counsel in his defence; he also abolished forfeitures in the case of deodands and suicides. The law of primogeniture, which gave lands to the oldest son in exclusion of the rest, has been abandoned in all the states, I believe. The rules of descent, however, introduced instead of it, are not every where the same. Generally, the principle of the English statute of distribution has been adopted in relation to descents. A peculiarity in Pennsyl-

vania, directly opposed to the common law, is, that inheritances *ascend* in certain cases, and the father and mother take; and collaterals take by representation *ad infinitum*, in default of lineal heirs. Estates tail are either entirely abolished, or modes provided by statute for barring them. In Pennsylvania it is done by the tenant in tail declaring in his deed, that it is his intention so to do, and to convey a fee simple. Joint tenancies, except in trust estates, have been abolished, and converted into tenancies in common. All the old incidents to the feudal tenures are disused, and *wager of law or battle* would not now be allowed. The "*droit d'aubaine*," which confiscated the lands of aliens, has been entirely repealed, by an early act of assembly.

In a variety of other particulars the common law has been varied and modified, so as to suit the circumstances of our situation. The administration of Justice is generally on the English plan; its forms are however, much simplified and perhaps improved. *Special pleading* is driven out of court; but possibly in getting rid of its circumlocution, we have lost its precision. The old mode of proceeding in Ejectments, by a train of absurd fictions, is now abandoned, and a common sense and intelligible plan substituted. There are courts of Chancery in most of the states; but in Pennsylvania there is none. The Judges are however, sworn to do equal right and Justice to all men, to the best of their judgment and abilities. Causes, therefore, through the aid of a Jury, are determined according to *equity* as well as positive *law*,—equity being a part of the law. The Constitution gives specific chancery power in enumerated cases. The probate of wills, and granting letters of administration in the Commonwealth, is vested in the *Registers*; and other portions of English ecclesiastical Jurisdiction are given to our *Register's Court* and *Orphans' Court*.

The distribution and arrangement of judicial power and jurisdiction, is very much as it was at common law; and the mode of trial, in its general features, the same. Our Constitution "in all prosecutions by *indictment* or *information*," guaranties a trial by Jury, and declares that no one shall "*be deprived of his life, liberty, or property, unless by the Judgment of his peers*—OR, THE LAW OF THE LAND." This last clause (which is copied from the "*Magna Charta*" of England) plainly implies (as has been often decided) that *there are cases* in which a man may be proceeded against *criminally*, without the intervention of a Jury.

The most prominent instance in which this summary power of penal infliction is exercised, is that of *attachment for contempts*; an instrument of the common law, necessarily placed in the hands of the Judges, to protect themselves from outrage or insult and their proceedings from reproach. It is said by Chief Justice McKean, in pronouncing the Judgment of the Court in the case of Oswald; "not only my brethren and myself, but likewise all the Judges of

England, think that *without this power no Court could possibly exist*;—nay, that *no contempt* could possibly be committed against us, we should be so truly *contemptible*.” The law upon the subject is of immemorial antiquity, and there is not any period when it can be said to have ceased or discontinued. In the same case, he adds—“*nor can the artifice prevail, that insinuates that the decision of the Court will be the effect of personal resentment*; for if it could, every man might evade the punishment due to his offences, by first pouring a torrent of abuse upon his Judges and then assert that they act from passion, because their treatment has been such as naturally to excite resentment in the human disposition:” and he further observes—“Being a *contempt*, if it is not punished immediately, how shall the mischief be corrected? Leave it to the customary forms of a trial by Jury, and the cause may be continued long in suspense, while the party perseveres in his misconduct.”

In truth, the process of attachment is a modification of the *principle of self defence*, which is indispensable to legal administration. Judges cannot avoid making enemies. They have to decide between the conflicting, and the bad passions of men. A losing party is often inflamed with resentment against the Court which determines him to be in the wrong. Again it becomes their duty to punish offenders, and here they are exposed to malice and revenge.

“No man e’er felt the halter draw,
With good opinion of the law.”

No doubt, Judges would often be assailed by ruffians, upon whom they have visited the just penalty of their misdeeds, were it not that this salutary power restrains. Who would occupy a station on the bench, if he must be driven to the necessity of defending or vindicating his official conduct by the arm of flesh, and, perhaps, shedding the blood of a blackguard assailant, against whom he has been required to express some Judicial opinion.

Robertson, the historian, in describing the deplorable state of society in Europe, during the middle (or dark) ages, ascribes it, in a great measure, to that ferocious spirit among the people, which led to the establishment of what is called the *trial by duel* or *judicial combat*. He says—“not only might parties whose minds were exasperated by the eagerness and the hostility of opposition, defy their antagonist, and require him to make good his charge, or to prove his innocence with his sword; but witnesses, who had no interest in the issue of the question, though called to declare the truth by laws, which ought to have afforded them protection, were equally exposed to the danger of a challenge, and equally bound to assert the veracity of their evidence by dint of arms.”

“To complete the *absurdities* of this *military jurisprudence*, even the character of a Judge was not sacred from its violence: any one of the parties might interrupt a Judge, when about to declare his

opinion; might accuse him of iniquity and corruption, in the most reproachful terms, and throwing down his gauntlet, might *challenge him* to defend his integrity in the field." In consequence of this barbarous state of public feeling, the "*natural course* of proceeding," he adds, "both in criminal and civil questions, was entirely perverted. *Force* usurped the place of *equity* in Courts of Judicature, and *Justice* was banished from her proper mansion." The progress of science and intellectual improvement at length subdued the rugged, brutal temper of those times. Men became sensible of the source of their wretchedness, and acquiesced in the remedy. The administration of Justice became regular and safe. "The proceedings of Courts were directed by known laws;"—"and the people of Europe advanced fast towards civility, when this great cause of the ferocity of their manners was removed."

As early as the first records of the common law, the *power* of punishing contempts by attachment, has been *inherent* in all Judicial tribunals, as *indispensable* to the *proper exercise of their functions*. Without it, our most valued institutions would be useless. Even the boasted *trial by Jury* would be no guaranty for the safety of the citizen, if witnesses might be deterred, by menace or violence, from giving evidence, or constrained by fear, to swear falsely; or, if Jurors themselves could be overawed in the discharge of their duty, by the apprehension of threatened outrage. Judge Blackstone, indeed, considers that this summary power in the Courts, is absolutely necessary to the *purity* and *efficiency* of the Jury system. The Judges must have legal authority to protect not only their own persons and their Judicial acts, but also the persons and rights of their officers, suitors, Jurors and witnesses. *A contempt is not indictable*: it must be punished by *the very Court* to which it is offered. A Judge of the Common Pleas or Orphans' Court, for an insult or injury to him, while acting as such, cannot have recourse to the Quarter Sessions for redress. He is bound by his official duty to reprehend the offender according "*to the law of the land*:" that is, by *attachment*, and in no other mode. If the trial by Jury must be resorted to, it would follow that the *Judges of the Supreme Court*, for the greatest outrage committed upon them, in their *official character*, would have to go into the County Sessions for redress. The absurdity of this must be obvious. It would result in this: a *weak* or *timid* Judge would always be disposed from fear of *personal violence* to ascertain which of the parties before him was the *greatest ruffian*, and decide in *his* favour. To say that he can have recourse to a *criminal court*, and the formal process of a *Jury trial* for redress or protection, is altogether idle. Place it upon that footing, and we go back to the ferocious barbarity of the dark ages: No man of sensibility or honor would accept of a place exposed to such hazards. In all nations where civil polity is well organized, the summary power of punishing con-

tempts is exercised by the judicial tribunals and legislative bodies, as *inherent and essential to their very existence*. It has repeatedly been resorted to by Congress; and that not only for *disturbance or insult* to that body while *actually sitting*, but for *indignity and outrage* offered to the *members out of doors*. The case of General Houston is a recent, and memorable instance. Now, the Constitution of the United States contains no *express grant* of such a power. It has, however, never been doubted: because the *necessity* of it is *unquestionable*; it is therefore *implied*. The Legislature of Penna. has always asserted the power, both before and since the Revolution: yet our present Constitution has no provision, *in terms*, giving such summary jurisdiction. The 13th Sec. of the 1st. article declares, that each house may "punish its members" and "with the concurrence of two thirds, expel a member;" but says nothing about contempts. It adds, however, that they shall have "all other powers necessary for a branch of the Legislature of a *free state*:" and the power to protect its members from insult is of course implied. As an indispensable part of the Judicial authority, it has never been doubted; and there are innumerable acts of assembly in which it is recognized as existing, and the exercise of it enjoined. There are many cases also, where the courts have actually employed it, not only for their own protection, (because, to the honor of the country, but few cases of direct insult or outrage have occurred,) but for the protection of jurors, suitors and witnesses, and for guarding the administration of Justice from being obstructed, or the rights of litigant parties from being affected. The power of punishing what were called *constructive contempts*, has been carried very far. The case of Passmore was of this kind: an attachment was granted by the Supreme Court against him for putting up a paper in a Coffee house, reflecting upon his adverse party in a cause pending. He was fined and imprisoned. An impeachment of the Judges was voted and they were tried. The managers on the part of the house of Representatives, distinctly conceded "*that every court of Justice necessarily possess the power of punishing contempts committed in their presence and whilst in session*," but contended that the case of Passmore did not fall within the range of this summary Jurisdiction. The Senate, however, acquitted the Judges. Perhaps this case led to the act of 3d April 1809, which modified the common law, as to constructive contempts, and restricted the power to "*issue attachments and inflict summary punishments*," to cases of "*official misconduct of the officers of the court; the negligence or disobedience of officers, parties, jurors or witnesses, against the lawful process of the court and the MISBEHAVIOUR of any person, in the presence of the court, obstructing the administration of Justice*." It also declares that the punishment of *imprisonment*, in the first instance, shall extend only to such contempts as are

committed *in open court*, and all other contempts shall be punished by *fine* only: "Provided, that the Sheriff or other proper officer may take into custody, confine, or commit to prison, until such fine is discharged or paid; but if he shall be unable to pay such fine, such person may be committed to prison for any time not exceeding three months." This act does not alter the common law, as to *direct* contempts by *officers parties, jurors or witnesses*, whether *in court, or out of court*: Nor does it make any change in regard to the "*misbehaviour* of any person in the *presence of the court* obstructing the administration of Justice." The true meaning of this latter clause is all that can occasion any doubt. Did the Legislature intend that the Judges should have power to protect themselves merely while *sitting on the Bench*? but the moment, they left their chairs, to go to their lodgings for dinner, they might be assaulted by a ruffian, in the face of the county. If they did, they have manifested more respect for the *seats*, than for the *persons* of the Judges, or the dignity of their office. This is impossible: They must have meant what the language sufficiently expresses, and what the managers in the case of Passmore conceded, that the Judges should have this power to protect themselves "*whilst in Session*." If they have not, it will come to this; that they must go and return from their lodgings to the Court house with weapons of defence in their hands. Such cannot be the law. It would inevitably lead not merely to the total prostration of Judicial authority and respectability; but perhaps to the shedding of blood. In legal apprehension, the *court is always sitting during the term*; as much while taking refreshments, as when engaged in the actual labor of their station. But the act says, "*in the presence of the court &c.*" Now what constitutes the court? Is it the *persons* of the *Judges*, or is it the *chairs* they sit upon? Can it be possible that for a legal opinion expressed, a Judge can be assailed immediately upon leaving the bench; and that he cannot protect himself without having recourse to a Justice of the Peace? However strange this idea may appear, yet a case has occurred in which it seems to have been entertained: but as I consider the course of proceeding erroneous and derogatory, I have been induced to allude to it, and to address the remarks I have made on the subject generally, through you to the public, that there may be no misapprehension as to my view of the law, and my determination to enforce it in every similar case. It may therefore be distinctly understood, that as a member of the court, I will not only endeavour to perform its duties faithfully and fearlessly, but I will try to maintain its authority and respectability: and if either is sunk or prostrated, it will be because my opinion as to the correct course is not sustained by my brethren.

This much I owe to the people, whom I represent. In this country a Judge is not considered *in loco regis*: he does not stand

in the place of the King and exercise his authority, but he is the delegated agent of the people, and is surrounded by the majesty of the law. An insult offered to him in that capacity, is an insult to the whole community. In my *private* character and relation, I ask no other protection than what every citizen may claim; but in my Judicial station, and so far as my official acts are concerned, I will exercise the summary power the law gives, to punish any rude, violent, or contumelious attempts upon my person or authority.

[The ordinary legal definitions and descriptions which followed, it is thought unnecessary to introduce.]

ERRATUM.

Page 5, second line from bottom, for *inferred*, read *enforced*.

GRAND JURY ROOM, }
Washington, Jan. 30, 1835. }

Hearing with surprise and regret, that petitions and other proceedings, on the part of a portion of the people of the 14th Judicial District are in circulation, calling upon the Legislature to inquire into the official character and conduct of the Hon. Thos. H. Baird, President Judge of said district, with a view to his impeachment or removal by address, we the undersigned, Grand Jurors, in and for the county of Washington, for January Term, 1835, beg leave to express to the Legislature and to the world, our undiminished confidence in the ability, integrity, impartiality, and correct official conduct and deportment of our worthy and respected Judge.

Shesh. Bentley, Jr.
Enoch Wright,
John Sharp,
Wm. Roney,
David Hay,
John Blakeway,
Wm. Campbell,
Odel Squire,
Joseph Clarke,
George Barnet,
Wm. M'Kenna,
Samuel Lawton,
John Griffith,
Richard Donaldson,
Samuel Christy,
John Donaldson,
Isaac Dage,
Thos. H. Hopkins,
Robt. Magear,
Charles Stoolfire,
John McMillen,

Williamsport.
Peters Township.
Hopewell do.
N. Strabane do.
Chartiers do.
E. Finley do.
Mt. Pleasant do.
Morris do.
Canton do.
Chartiers do.
W. Bethlehem do.
Cross Creek do.
Washington
Smith Township
Robinson do.
do. do.
Amwell do.
Pike Run do.
Smith do.
Donegal do.
N. Strabane do.

I hereby certify that there were but twenty-one Jurors in attendance, and that the above is unanimously signed.

SHESH. BENTLEY, Jr. *Foreman.*

